No. 22638

In the

United States Court of Appeals

For the Ninth Circuit

REX SCHEPP, et ux.,

Appellants,

vs.

ELLEN LANGMADE, et al.,

Appellees.

On Appeal from the United States District Court
for the District of Arizona

Brief for Appellants

WELLIEVER, STIDHAM, SMITH & HOLT
16 Luhrs Arcade
Phoenix, Arizona 85003
Attorneys for Appellants

SORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

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JURISDICTIONAL STATEMENT

Trial was had on the above entitled cause in the United States District Court for the District of Arizona on May 16, 1967, to the Court sitting without a Jury. On September 21, 1967, the Court entered Judgment in favor of the Plaintiff-Appellees. (TR 10-11) The Defendant-Appellants made timely motions for new Trial and/or to alter and amend Judgment. (TR 155) Defendant-Appellant's said Motions were denied on November 6, 1967 by the Court. On December 4, 1967, Defendant-Appellant filed their timely Notice of Appeal and supersedeas bond on Appeal. On December

29, 1967, Defendant-Appellants filed a second Motion for New Trial under Rule 60, alleging that the Defendants had been deprived of their right to a Trial by Jury. Said second Motion for New Trial under Rule 60 was denied on January 15, 1968, by the Court.

This matter was before the United States District Court for the District of Arizona pursuant to Title 28 USC Section 1332 and is presently before this Court pursuant to Title 28 USC, Section 1291.

STATEMENT OF THE CASE

Stephen W. Langmade, Plaintiff-Appellee's intestate, was an attorney and rendered legal services to Evansville Television, Inc. and it was agreed that the reasonable value of Langmade's services was $37,000.00 (TR 33). Langmade agreed with Evansville Television, Inc. to accept 1,000 shares of Class A stock and 1,000 shares of Class B stock of Evansville Television, Inc. which it was agreed was worth $20.00 per share or a total of $40,000.00 (TR 33). Langmade paid $3,000 to Evansville Television, Inc. in order to make up the difference between the agreed value of his services and the agreed value of the stock and received 1,000 shares of Class A and 1,000 shares of Class B common stock of Evansville Television, Inc. (TR 33). Subsequently, the Defendant-Appellant Schepp and Langmade entered into a written agreement that Langmade was entitled to 2,000 shares of Class B stock which Langmade was to receive from Evansville Television, Inc. after return of the stock certificates for the 1,000 shares of Class A and 1,000 shares of Class B stock, which Langmade subsequently sent to Appellant Schepp in Schepp's capacity as President of Evansville Television, Inc. (TR 34-35). After Langmade returned the Class A and Class B stock to the corporation

Appellant Schepp was restrained by a temporary restraining order issued by the Probate Court of the State of Indiana on November 8, 1956, from acting in his capacity as President of Evansville Television, Inc. until further Order of the Court. (TR 35). This restraining order and injunction continued in full force and effect until the year 1960. (TR 35)

In 1957, demand was made by Langmade upon Evansville Television, Inc. demanding issue of the previously surrendered capital stock which Evansville Television, Inc. refused to do. (TR 35). In 1957 Langmade commenced an action in the United States District Court for the Southern District of Indiana, Evansville Division, against Evansville Television, Inc. asking Judgment against the corporation for $40,000.00 and subsequently this lawsuit was dismissed by an agreement between Langmade and Evansville Television, Inc. whereby Langmade was to receive 1,000 shares of Class B and 400 shares of Class A common capital stock of Evansville Television, Inc. (TR 36)

It is the Appellees contention and the Trial Court found that the Appellant Schepp orally advised Langmade's attorney that Appellant would make up the difference between the 400 shares of Class A stock offered by the corporation and the 1,000 shares of Class A stock which Langmade was demanding and would deliver to Langmade 600 shares of Class A stock. (TR 149-150) The Appellant Schepp testified at the Trial that he never made any promises relative to supplying any additional shares from the shares which Appellant owned himself. (TP 18) Schepp also testified at the time of the Trial that he never signed any Memorandum, Agreement or letter or any other writing wherein he undertook to supply an additional 600 shares to Langmade to make up the difference between the 1,400 shares promised by Evansville Television, Inc. and the 2,000

shares which Langmade had turned in. (TP 19) As such, viewing the matter in the light most favorable to the Appellees, it can be said that at most, there was an oral statement made to Langmade's attorney by Schepp that he would deliver or cause to be delivered to Langmade the remaining 600 shares of Class A stock of Evansville Television, Inc. (See Plaintiff-Appellees Amended Complaint, pg 7, Paragraph XIII appearing at TR 7). The Defendant-Appellants on the bottom of Page 3 of their Amended Answer specifically denied any such promise. On page 7, Paragraph XIII (TR 29) Defendant-Appellants affirmatively included the statute of frauds alleging no written memorandum. Defendant-Appellants in its post Trial memorandum made a Motion to Amend the Pleadings to conform to the evidence and further to allow Plaintiff to more *specifically* plead the statute of frauds (TR 50) which was denied by the Trial Court (TR 141). Thus, as a legal matter, the Court failed to consider the statute of frauds as a defense notwithstanding the fact that the same had been sufficiently pleaded in the Amended Answer by the Defendant-Appellants as heretofore mentioned. Similarly, since the Statute of Frauds was not considered by the Trial Court, Findings of Fact numbers 18, 19, and 20 are also erroneous. (TR 149-150).

On December 30, 1955, a written agreement was entered into between Schepp and Langmade which provided that in the event either of the Defendant-Appellants Schepp should sell any of their stock, they would also sell the stock of the Plaintiff-Appellees Langmade at the same price and in an equal proportion. (TR-22) (Exhibit 4). On July 3, 1956, in another written agreement, the December 3, 1955 agreement between the Schepps and the Langmades was reiterated. (TR-13-14) (Exhibit 6). An agreement was en-

tered into between Langmade and Evansville Television, Inc during October of 1958 (TR 17-21) which was a settlement of Langmade's lawsuit against Evansville Television, Inc. whereby Langmade received 400 shares of Class A and 1,000 shares of Class B or a total of 1,400 shares of Evansville Television, Inc. stock. (See also TR 36). Sometime prior to June 28, 1962, Langmade authorized Schepp to sell 1,400 shares of Langmade's stock for the sum of $28.00 per share or a net of $28,000.00 with no broker's commission (Exhibit Number 14), and on June 28, 1962, Producer's Incorporated sent Langmade a check for $28,000.00 (TR 37). On July 3, 1962, Langmade acknowledged receipt of the $28,000.00 check and mailed the 1,400 shares of stock, Langmade then executed a receipt and assignment to Producer's Incorporated. (TR 37-38). Schepp testified that the Schepp's sold their stock after Langmade sold his. (TP 27-28) Thus, the question presented is whether there is any evidence to support Finding of Fact #21 and whether the Schepp-Langmade Agreement of December 30, 1955 (TR 22) was rescinded by Langmade's authorization to Schepp to sell Langmade's 1,400 shares for $28.00 per share (Exhibit 14).

Subsequent to the Trial, on December 29, 1967, Defendant-Appellants filed a Motion for New Trial under Rule 60 (TR 182-194) on the ground that Defendant-Appellants were deprived of their right to a Trial by Jury and as a result were also denied due process of law for reason that the Defendant-Appellants themselves, at numerous times requested of their attorney a Jury Trial (TR 188-189) and it was always their understanding that they would receive a Trial by Jury. The Court denied Defendant-Appellants Motion for New Trial under Rule 60 on January 15, 1968. (TR 211). The question thus before the Court is whether the Defendant-Appellants were deprived of their right to a Trial by Jury and due process of law.

SPECIFICATIONS OF ERROR

I. The Trial Court committed prejudicial error when it denied Defendant-Appellants motion to amend the pleadings thus refusing to consider the statute of frauds as a defense, as a result of which Findings of Fact #18, 19 and 20 are erroneous.

II. The Trial Court erred in making Finding of Fact Number 21 that the value of the six hundred shares of Class A stock was $30.00 per share, and thereby finding damages of $18,000.00, and Finding of Fact #22 that the December 30, 1955 contract was in effect and was breached.

III. The Trial Court committed prejudicial error in denying Defendant-Appellants Motion for New Trial under Rule 60, thus depriving the Defendant-Appellants of their Constitutional right to a Trial by Jury.

ARGUMENT

I. The Trial Court Committed Prejudicial Error in Denying Defendant-Appellants Motion to Amend the Pleadings and Thereby Refusing to Consider the Statute of Frauds as a Defense, as a Result of Which Findings of Fact #18, 19 and 20 Are Also Erroneous.

In Paragraph XIII on page seven of Plaintiff's Amended Complaint (TR 7) the Plaintiff-Appellees alleged that the Defendant-Appellant advised Langmade and Langmade's attorney that he, Appellant, would deliver or cause to be delivered the remaining 600 shares of Class A stock of Evansville Television, Inc. This was answered by the Defendant-Appellant's Amended Answer specifically on pages 3 and 4 of said Answer (TR 25-26) wherein it was alleged as follows:

> "Specifically deny the last paragraph of Paragraph XIII, commencing on line 4 of page 7 of Plaintiff's Amended Complaint and allege that the Defendant, Rex Schepp did not, at any time promise that he would

deliver or cause to be delivered to Stephen W. Langmade any additional shares . . ." (TR 25-26)

Answering the second claim of Plaintiff's Complaint Defendant-Appellants incorporated by reference the same specific denial of any oral promise to deliver stock by Schepp which appears in Paragraph I of the Answer to the second claim on page 4 of Defendant-Appellant's Amended Answer (TR 26). Further, in Paragraph XIII appearing on page 7 of Defendant's Amended Answer (TR 29), the Defendant-Appellants alleged that there was no written memorandum whereby Schepp agreed to deliver the six hundred shares as alleged in Plaintiff's Complaint.

As such, it can be clearly seen that Section 44-101 of Arizona Revised Statutes, 1956, the Statute of Frauds, was alleged as a separate and affirmative defense even though the exact words "STATUTE OF FRAUDS" were not used. However, it is also submitted that it is not necessary to allege the exact title of the statute, but the mere substance of the statute having been alleged, was sufficient.

In 37 CJS 275, Statute of Frauds, pg 800, it is stated that,

> ". . . it is not necessary to refer to the Statute by name; it is enough to allege facts bringing the case within its provisions."

In the case of *Kohlprecher v. Guettermann,* 329 ILL 246, 160 NE 142 (1928), the Court stated as follows:

> ". . . the rule in pleading the Statute of Frauds is that express reference to the Statute is *not necessary* but sufficient facts must be stated to show that the Defendant seeks the protection of the Statute." (Emphasis supplied)

Thus the Defendant's allegation that there was no written memorandum was clearly sufficient to plead the Statute of Frauds. Again, the Defendant-Appellants express denial

and affirmative allegation that Rex Schepp did not, at any time, promise that he would deliver or cause to be delivered to Langmade any additional shares appearing in Paragraph VIII of Defendant-Appellant's Answer to the First Claim and incorporated by reference in Paragraph I in Answer to the Plaintiff's Second Claim (TR 25-26) was sufficient to allege the Statute of Frauds as a defense to both the first and second claims of Plaintiffs Amended Complaint.

In support of this the case of *Cook v. Cave,* 260 S.W. 49, (Ark. 1924) is cited. The same question came up in the Cook case, supra, and on page 51 the Court Stated as follows:

> "the Plaintiff filed a reply to the Answer in which he denied making the nude verbal agreement with the Defendant. The denial in the replication of the Plaintiff of the making of the oral contract on which the Defendant based her cross action is *as effective for letting in the defense of the Statute of Frauds as if the statute had been specifically pleaded.* The reason is that the reply denied the existence of a new agreement and it was incumbent upon the defendant to prove a legal agreement which in cases within the Statute of Frauds must be a written one . . . we think it clear upon principal under our statute of frauds and system of pleading that *it is sufficient to deny the contract without referring to the Statute.* Where the pleadings present the issue of agreement, or no agreement, the party relying upon the agreement must prove a valid one. If the Plaintiff had admitted that a verbal agreement had been made as alleged by the Defendant, then he must have pleaded the statute of frauds in order to rely upon it. *The Plaintiff having denied in his reply the oral agreement alleged in the answer, the statute af frauds became a question of fact at the hearing.*" (Emphasis supplied)

Thus it appears that the denial effectively and affirmatively pleaded the Statute of Frauds as a defense.

In the Defendant-Appellants opening post Trial Memorandum, the Defendant made a Motion to amend the pleadings and it is respectively submitted that the Defendant's Motion should more properly have been entitled a Motion to "Characterize" the statute of frauds as properly having been pled. Had the Court considered the defense of statute of frauds, it would have found in Defendant's favor.

In the case of *Humphrey v. Faison,* 247 N.C. 127, 100 S.E.2d 524 (1957) the Supreme Court of North Carolina stated as follows:

> "the Defendant in this action denied in her answer that the alleged oral agreement was ever made. Such denial invoked the statute of frauds as effectively as if it had been expressly pleaded. Furthermore, a denial of the agreement is equivalent to a plea of the statute."

In accord *Hunt v. Hunt* 261 N.C. 437, 135 S.E.2d 195 (1964). See also *Bauer v. Monroe,* 117 Mont. 306, 158 P.2d 485 (1945): *Collett v. Goodrich,* 119 Utah 662, 231 P.2d 730 (1951); *Tadgham v. Wilson Music Co.* 3 Wis. 363, 88 N.W.2d 679 (1958).

In the case of *San Francisco Brewing Corp. v. Bowman,* 52 C.A.2d 607, 343 P.2d 1 (1959) the Supreme Court of California stated as follows:

> "Defendant also says that Plaintiff waived its right to rely upon the statute (of frauds) by not specifically pleading the statute and by not objecting to testimony in proof of the contract. But, Plaintiff denied the making of the contract in toto and that has been held sufficient to justify reliance upon the statute of frauds." Followed in *Connelly v. Venus Foods, Inc.* 345 P.2d 117 (Calif. 1959)

It is the Appellants position that the Appellant's Answer as heretofore mentioned which denied specifically the oral contract raised the statute of frauds. The Court, having failed to consider said defense, committed prejudicial error.

On May 16, 1967, the date of the Trial, the Court ordered the case taken under advisement, and ordered respective counsel to file memoranda. (TR 210). In accordance with the Order of the Court, the Defendant-Appellants filed their Opening Memorandum on June 16, 1967, which included a Motion to Amend the Pleadings to conform with the evidence (TR 50) to set forth facts and circumstances which would make clear the Defendants Affirmative Defense of Statute of Frauds. The Court denied Defendant-Appellants' Motion to Amend the Pleadings on July 6, 1967 (TR 141). At this point, it is respectfully submitted that the Court committed prejudicial error in denying Defendant-Appellants Motion to Amend the Pleadings and thus denying to Defendant-Appellant the defense of Statute of Frauds. It is the Appellants opinion position that the Court's Order denying Defendant-Appellants Motion to Amend the Pleadings was an abuse of the Court's discretion in the matter and was prejudicially erroneous.

II. The Trial Court Committed Prejudicial Error in Making Finding of Fact #21 That the Value of the Class A Stock of Evansville Television, Inc., Was $30.00 Per Share, and Thereby Finding Damages of $18,000.00, and in Making Finding of Fact #22 That the December 30, 1955 Agreement Was in Effect and Was Breached.

On June 25, 1962, Appellee-Langmade, dispatched a communication to the Appellant Schepp authorizing Schepp to Sell 1,400 shares of Langmade's stock for $20.00 per share or a net of $28,000.00 (TR p. 37, 82) (Exhibit No. 14). On June 28, 1962, Producers, Inc., directed a letter to "Lang-

made accepting Langmade's authorized offer and enclosed a check for $28,000.00 to Langmade. (TR 37, 82) It is the Appellant's position that the authorization of June 25, 1962, by Langmade to Schepp, to sell Langmade's 1400 shares of stock at $20.00 per share or a net of $28,000.00, legally operated as a rescision of the December 30, 1955 agreement between Schepp and Langmade (Exhibit Number 4) (TR 22). In making Findings of Fact #21 & 22, the Court committed prejudicial error because those findings are based upon the fact that there was a breach of the December 30, 1955, contract between the parties. To reiterate, it is the Appellant's position that the December 30, 1955, agreement by the parties was rescinded when Langmade authorized Schepp to sell Langmade's shares at $20.00 per share and when Langmade accepted the Producer's check for $28,-000.00. Schepp was discharged from the agreement by Langmade's June 25, 1962 authorization. Langmade's act of authorizing Schepp to sell the 1400 shares at $20.00 per share and the immediate reply from Producer's directed to Langmade together with the $28,000.00 check from Producer's for the shares certainly amounted to acts and conduct of the parties completely and totally inconsistent with the continued existence of the December 30, 1955, agreement.

In 17 Am Jur2d, Contracts, Sec. 494, it is stated as follows:

> "a contract may be rescinded or discharged by acts or conduct of the parties inconsistent with the continued existence of the contract and mutual assent to abandon a contract may be inferred from the attendant circumstances and conduct of the parties." (Cases cited)

The December 30, 1955 agreement (TR 22) provided that if the Schepps should sell any of their stock, they would also sell Langmade's stock at the same price and in the same proportion. This agreement of December 30, 1955 did

not provide for any limitation of time and in such cases the law implies a reasonable time where the continuation of a contract is without definite duration. At most the contract could be considered as one terminable at will. 17 Am. Jur.2d Contracts, Sec. 486; *Ansbacher-Siegle Corp. v Miller Chemical Co.* 137 Neb. 142, 288 N.W. 538; *Grand Lodge Hall Assoc. v. Moore,* 224 Ind. 575, 70 N.E.2d 19, 173 A.L.R. 6 Affd 330 U.S. 808, 91 L.ed 1265, 67 S.Ct. 1088, Rehearing Denied 333 U.S. 864, 91 L.ed. 1869, 67 S.Ct. 1201.

Viewing the contract and agreement of December 30, 1955, in the light most favorable to the Appellees, the Trial Court should have found that the contract was terminable at will, and Langmade, by his authorization to Schepp to sell Langmade's shares at $20.00 per share, terminated the contract and discharged Schepp from its terms. It is interesting to note that Langmade waited six and one half years from the December 30, 1955 contract until June 25, 1962 when he authorized Schepp to sell his shares at $20.00 per share.

Thus, it is the Appellants position that the Court erred in making Findings of Facts #21 & 22 finding the value of the shares at $30.00 per share based upon the Finding of Fact #22 that the contract of December 30, 1955 was valid and that the Defendant-Appellant's breached said contract.

III. The Trial Court Committed Prejudicial Error in Denying Defendant-Appellant's Motion for New Trial Under Rule Sixty, Thus Depriving Defendant-Appellants of Their Constitutional Right to a Trial by Jury and Due Process of Law.

Appellant Schepp, in his affidavit (TR 190) stated that when he retained attorney Joseph B. Miller, he specifically asked if a Jury would be secured and Mr. Miller responded in the affirmative. On numerous occasions appellant instructed his attorney to demand a Jury Trial (TR 190). On

August 6, 1966, Appellant, Rex Schepp wrote a letter to Mr. Miller stating that he requested a Jury Trial and asking Mr. Miller if he had asked for this (TR 188). Mr. Miller responded on August 9, 1966, in a letter to Schepp that "we are asking for a Trial by Jury" (TR 189). On December 27, 1967, for the first time, Appellant brought these facts to the attention of his attorney, Charles C. Stidham. (TR 194) Immediately a Motion for New Trial under Rule Sixty was filed (TR 182) which was denied by the Court on January 15, 1968 (TR 211).

It is the Appellant's position that the Appellants were denied their right to a Jury Trial and due process of law under the United States Constitution, Amendments VII, and XIV-Section 1 (Due Process Clause); Federal Rules of Civil Procedure, Rule 38 (a); Constitution of the State of Arizona, Article II, Section 23; Arizona Rules of Civil Procedure, Rule 38 (a), Arizona Revised Statutes, 1956; and Arizona Rules of Civil Procedure, Rule 38(d), Arizona Revised Statutes, 1956.

Rule 38(d) of the Arizona Rules of Civil Procedure, supra, provides as follows:

> ". . . a demand for Trial by Jury made as herein provided may not be withdrawn without the consent of the *parties*." (Emphasis supplied)

The summary of the official Court record and docket reveals that on February 14, 1964, the Plaintiff-Appellees filed a Motion to set for a Trial to a Jury. (TR 209). On January 23, 1966, the Trial Court entered a Pre-Trial Order that the Trial would be re-set for Tuesday, May 16, 1967, *before a Jury* (TR 210). On pg. 5 of the Plaintiff's response to Defendant's Motion for New Trial under Rule Sixty (TR 200), the Plaintiff-Appellees set forth the text of the Pre-Trial Order entered May 8, 1967, by the Trial

Court. No where does said Pre-Trial Order provide that Trial was to be had to the Court sitting without a Jury.

Rule 39(a) of the Federal Rules of Civil Procedure, USC, provides as follows:

> "(a) by Jury. When Trial by Jury has been demanded as provided in Rule 38, the action shall be designated upon the docket as a Jury action. The trial of all issues so demanded shall be by Jury *unless* (1) the parties or their attorneys of record, by written stipulation *filed with the Court* or by an oral stipulation made in open Court and *entered in the record,* consent to Trial by the Court sitting without a Jury or (2) the Court upon Motion or of its own initiative finds that a right of a Trial by Jury of some or all of those issues does not exist under the Constitution or Statutes of the United States."

The only writing filed was on May 16, 1967, the trial day, which was the minute order, in accordance with a stipulation of counsel to the effect that *counsel* had waived a Jury Trial in the case.

Thus, it can be clearly seen that, pursuant to Rule 39(a) of the Federal Rules of Civil Procedure, there was no stipulation entered into the record until the Trial itself. The Appellant Schepp was under the impression that a Jury Trial would be had and never authorized or consented to his attorney waiving the Jury Trial.

In the recent Arizona case of *Wiseman v. Young,* 4 Ariz. App. 573, 422 P.2d 404 (1967), the Court of Appeals of Arizona was confronted with a similar fact situation wherein the Plaintiff demanded a Jury Trial in compliance with Rule 38 of the Arizona Rules of Civil Procedure, ARS, 1956 the source of which is Federal Rule of Civil Procedure #38, USC. On the day preceding the Trial, counsel for both parties, *on the advice of their clients* agreed to

waive a Jury Trial and so advised the assignment clerk according to local custom. Minutes later, the Defendants counsel was notified by his client that a Jury Trial should be demanded and the Defendant's counsel communicated this to the assignment clerk who in turn advised counsel that the Judge had refused to allow the Jury to be recalled. The Court of Appeals of Arizona reversed the Judgment and remanded the case for a new trial stating as follows:

> "... there was no waiver of a Jury Trial in the manner prescribed by the ARIZONA RULES OF CIVIL PROCEDURE, i.e., written waiver filed with the clerk or an oral stipulation made in open Court and entered in the record. Despite the local custom of waiving a Jury Trial by communicating such agreement to the assignment clerk, we think compliance with the rules in waiving a Jury Trial is as compelling as is compliance with the rules in demanding a Jury Trial."

It would seem to be the Appellees position that during the Pre-Trial Conference on May 8, 1967, counsel agreed to waive a Jury Trial, however, a minute Order was not entered in open court until the morning of the trial, *approximately a week later.* (TR 203). It is the position of the Appellants that if counsel agreed to waive a Jury Trial on May 8, 1967, the Pre-Trial Order should have incorporated this or a minute Order to this effect should have been entered on May 8, 1967. It is interesting to note that the Appellees position is that the stipulation of counsel was made *at the Pre-Trial,* but was not entered until the day of Trial. As such, it is the Appellants position that Rule 39 (a) of the Federal Rules of Civil Procedure was not followed in that (1) no written sitpulation was filed by the Court and (2) any oral stipulation as to waiving the Jury Trial that was allegedly made on May 8, 1967, was not "an oral stipulation made in open court and entered in the record" as required

by Rule 39, but rather the Stipulation was allegedly made on May 8, 1967 and approximately one week later, on the morning of the Trial, no further stipulation was made in open court but the previous oral stipulation was then entered into the record. It is the Appellant's position and it is respectfully submitted that the Trial Court committed prejudicial error in hearing the case without a Jury and subsequently, in the denial of the Defendant-Appellant's Motion for New Trial under Rule Sixty as heretofore stated.

CONCLUSION

Therefore, Appellants respectfully request that this Court reverse the Judgment of the Trial Court and that a New Trial be granted for the Trial Court's error in refusing to consider the Statute of Frauds as a defense available to Appellants and/or the erroneous Findings of Facts #21 and 22 and for committing prejudicial error in denying Appellants right to a Trial by Jury and denial of Appellant's Motion for New Trial under Rule Sixty.

Respectfully submitted,

Charles C. Stidham
Welliever, Stidham, Smith & Holt
Attorneys for Appellants

CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

Charles C. Stidham

(Appendix Follows)

Appendix